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In the

Supreme Court of the United States

October Term, 1949

No. 460

JIFFY LUBRICATOR COMPANY, INC.,
Petitioner,

v.

STEWART-WARNER CORPORATION,
Respondent.

Respondent's Brief In Opposition To Petition for Writ of Certiorari and in Opposition To Petition for Writ of Mandamus or Certiorari

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INTRODUCTORY STATEMENT

In its twenty-one page petition and its forty-six page brief in support thereof, petitioner seems to seek to obscure the simple questions determined by the courts below. Because of this attempted confusion engendered by the intermingling of nonrelated facts and law suits with the questions determined by the lower courts respondent now presents a short review of the record relevant to the real questions involved, together wtih the disposition of the case by the Court of Appeals.

The complaint filed in the United States District Court for the Eastern District of Virginia on July 23, 1948 by Jiffy Lubricator Company, Inc., charged defendant, Stew-

art-Warner Corporation, with infringement of Johnson patent No. 2,040,177.* (R. 1-2). It alleged that Jiffy Lubricator Company, Inc., is a North Dakota corporation having its principal place of business in Fargo, North Dakota (R. 1).

Pursuant to Title 28, USC, § 1404(a) which became effective September 1, 1948, Stewart-Warner Corporation, respondent herein, filed a motion for the entry of an order transferring the cause of action from the United States District Court for the Eastern District of Virginia to the United States District Court for the Northern District of Illinois, Eastern Division (R. 21). An affidavit of James S. Knowlson, President of Respondent, set forth facts which may be summarized as follows: (R. 21)

> (1) The general office and principal factory of Stewart-Warner Corporation are located at Chicago, Illinois, within the Northern District of Illinois, Eastern Division, and the corporation has no office staff, files, factory or books or records concerned with the subjects matter alleged in the complaint within the Eastern District of Virginia.
>
> (2) All of the officers and directors of Stewart-Warner Corporation have their residences and places of business within the Northern District of Illinois, Eastern Division.
>
> (3) The engineering and production design of Stewart-Warner's products charged to infringe the Johnson patent was carried out at Chicago; all of the manufacture of these products occurred at Chicago; and all of the books, records and documents relating to such engineering, design and manufacture together

* This patent has been held invalid by the Court of Appeals for the Eighth Circuit in the recent case of Alemite Co. vs. Jiffy Lubricator Co., 176 F. 2d 444.

with witnesses having knowledge thereof are located at Chicago.

(4) All of the products charged to infringe the Johnson patent were distributed from Chicago and all of the books, records and documents relating to such distribution are in Chicago.

(5) All of the books, records and documents relating to patents, patent applications and patent license contracts to which Stewart-Warner Corporation is a party are located at Chicago.

(6) All of the books, records and documents relating to Alemite Corporation referred to in the complaint are located at Chicago.

(7) All of the books, records and documents relating to the issue of false patent marking asserted in the complaint together with persons having knowledge of such books and records are located at Chicago.

(8) All books, records and documents of Stewart-Warner Corporation relating to its relationship with its distributors as alleged in the complaint are located at Chicago.

(9) All patent counsel and general counsel regularly retained by Stewart-Warner Corporation have their offices at Chicago.

(10) Since all of the books, records and documents, the directors, officers and employees of Stewart-Warner Corporation and its lawyers are located in Chicago in the Northern District of Illinois, Eastern Division, and since none of the books, records, documents or witnesses in any way connected with the subjects matter of the litigation are located within the Eastern District of Virginia and since the plaintiff is a North Dakota corporation with its principal place of business at Fargo, North Dakota, it would be far more convenient for the parties to the litigation to have a trial at Chicago, Illinois rather than at Richmond, Virginia.

The motion for a change of venue was argued before the District Court and on July 29, 1949 which entered an order providing in part:

> " * * * and the Court having considered the arguments of counsel and the affidavits of James S. Knowlson and John D. Black, filed by the Defendant in support of said motion, and of Leonard L. Kalish and August Johnson, filed by the Plaintiff in opposition thereto, and now being of opinion that for the convenience of the parties and witnesses, in the interest of justice, the motion of the Defendant should be granted, it is, therefore,
>
> "Ordered that the venue of this cause be transferred from this Court to the United States District Court for the Northern District of Illinois, Eastern Division * * *." (R. 72)

On August 23, 1949 Jiffy Lubricator Company, Inc., filed its notice of appeal to the United States Court of Appeals for the Fourth Circuit from this order of transfer (R. 73). Subsequently Stewart-Warner Corporation moved to dismiss the appeal and on October 10, 1949 an order to that effect was entered by the United States Court of Appeals for the Fourth Circuit (R. 126). On the same date the Court of Appeals filed an opinion (R. 123, 177 F. 2d 360) holding (1) that an order of transfer pursuant to 28 USC, § 1404(a) was not a final order and was not appealable under 28 USC, § 1291, (2) that an order of transfer did not grant an injunction and was not appealable under 28 USC, § 1292(1), and (3) that even if the order of transfer under 28 USC, § 1404(a) were appealable, the appeal in this case should be dismissed as presenting no question of substance because such an order was one resting in the sound discretion of the trial court and there was

nothing in the record to indicate any abuse of that discretion (R. 125, 177 F. [2] 360).

It thus appears that the *only* action taken by the trial court which is made the subject matter of the petition is the *discretionary* action, based upon a consideration of the relevant facts, *of transferring the venue jurisdiction from the District Court at Richmond, Virginia, to the District Court at Chicago, Illinois.*

Therefore the only questions raised by the petition, notwithstanding its length and the even longer brief filed in support thereof, and which are sought to be presented to this Court, may be stated succinctly as follows:

1. Is an order of transfer pursuant to Title 28, USC, § 1404(a) a *final* order so as to be appealable under Title 28, USC, § 1291?

2. May an order of transfer pursuant to Title 28, USC, § 1404(a) be interpreted as granting an injunction so as to constitute an interlocutory order appealable under Title 28, USC, § 1292(1)?

3. Did the District Court abuse its discretion in entering the order of transfer?

4. Is the decision of the Court of Appeals in conflict with decisions of other Courts of Appeal on the same matter, or probably in conflict with applicable decisions of this Court?

It is submitted that the first three questions were correctly answered below, and further, that there is no conflict with any Court of Appeals on the same question, nor with any applicable decision of this Court.

ARGUMENT

POINT I

An Order of Transfer Under Section 1404(a) of Title 28 USC Is Not A Final Order and Therefore Not Appealable

The applicable provision of the United States Code are as follows:

Section 1404(a) of Title 28, provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Section 1291 of Title 28, provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

The order of the District Court at Richmond, transferring this action to the District Court at Chicago, Illinois, did not adjudicate any of the rights of the parties, it merely changed the venue of the action and determined that "for the convenience of the parties and witnesses, in the interest of justice," the trial should be held at Chicago, Illinois, rather than at Richmond, Virginia. The cause of action, if any, asserted by the petitioner against respondent was in no way considered or affected.

The argument that the order of transfer was a final order and therefore appealable was asserted in the Court of Appeals and that Court in its opinion stated (R. 123-4):

> "The motion to dismiss must be granted on the ground that the order transferring the case is not a final order from which an appeal lies under 28 U.S.C. 1291. As was said by the Supreme Court in *Arnold* v. *United States for use of W. B. Guimarin & Co.,* 263 U. S. 427, at p. 434: 'It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final but complete, that is, final not only as to all parties, but as to the whole subject matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete [fol. 183] the writ of error or appeal must be dismissed for want of jurisdiction. *Hohorst* v. *Hamburg-American Packet Co.,* 148 U. S. 262, 264, 13 S. Ct. 590; *Collins* v. *Miller,* 252 U. S. 364, 370, 40 S. Ct. 347; *Oneida Navigation Corp.* v. *Job,* 252 U. S. 521, 40 S. Ct. 357: and cases therein cited.' * * *". (177 F. 2d. 360, 361, 362)

In addition to the cases cited in the foregoing quotation the Court of Appeals cited other decisions of Courts of Appeals reaching the same conclusion (R. 124). To the same effect, see the very recently published edition of *Moore's Commentary on U. S. Judicial Code,* Sec. 0.03(29), p. 210 (1949 Ed.).

The Court of Appeals also stated in this connection:

> "The general rule is well settled that an order granting or refusing change of venue is not appealable unless expressly made so by statute. 3 C. J. p. 473; 2 *Am. Jur.* 899-900; *Shay* v. *Rinehart & Dennis Co.,* 116 W. Va. 24, 178 S. E. 272, and cases there cited.

> There is no federal statute expressly granting an appeal from such orders; and the federal decisions follow the general rule that they are not appealable. *Cook* v. *Burnley,* 11 Wall. 659, 672; *Kennon* v. *Gilmer,* 131 U. S. 22, 24." (R. 124)

Petitioner suggests that an order of transfer pursuant to Section 1404(a), Title 28 USC, must be appealable because this section of the Code was enacted as a codification of the doctrine of "forum non conveniens" and that *dismissals* of actions resulting from the application of the doctrine were appealable. In its presentation, petitioner erroneously includes within the doctrine of "forum non conveniens" the appealability of final decisions rendered before the enactment of Section 1404(a) *dismissing* (and not *transferring*) complaints under the doctrine.

The doctrine of "forum non conveniens" has been defined as follows:

> "The doctrine of forum non conveniens is not of statutory origin. In Anglo-American law it has been used as a means of declining jurisdiction whenever 'considerations of convenience, efficiency and justice' point to another tribunal than that chose by a litigant as the appropriate tribunal." (*United States v. National City Lines,* 7 F. R. D. 456, 460.)

The above language was adopted in part from an opinion of this Court in *Rogers* v. *Guarantee Trust Co.,* 288 U. S. 123, 131. The doctrine was formulated by the Courts in situations where the plaintiff could pursue his remedy in an alternative and more convenient jurisdiction and where the Court in its discretion could, by *dismissing* the complaint, refuse to entertain jurisdiction leaving the plaintiff to pursue its cause of action in a more convenient forum. *Under the doctrine the Court was without legislative*

authority to transfer the cause of action to another jurisdiction. The action of the Court in *dismissing* a complaint where the doctrine was applied was a final order and gave to the plaintiff a right of appeal. It did not preserve the rights of the plaintiff as against the running of the statute of limitations or any other defense which might exist—and that fact is pointed out in the decisions rendered prior to the adoption of 1404(a) on change of venue.

The ancillary right of appeal, however, is not a part of the doctrine itself. While it may be conceded that the adoption of Section 1404(a) of Title 28 USC, substitutes statutory authority of *transfer* for the earlier nonstatutory doctrine of *dismissal* is a codification *in accordance* with the doctrine of "forum non conveniens", there is no suggestion in the reviser's notes to the new Codes that such codification *was intended to include the right of appeal which was inherent in the final order of dismissal where the doctrine was applied.*

The enactment of Sections 1291 and 1292 of Title 28 USC providing for appeals only in specific instances is a clear expression by Congress of the matters which are appealable and leaves no room for the implication that Congress intended to make orders of transfer (under § 1404a) appealable. The authorities cited by petitioners as to the appealability of an order *dismissing* a complaint under the doctrine of "forum non conveniens", all decided before 1404(a) was enacted, are not in point. These decisions are not in conflict with the order of the Court of Appeals which dismissed petitioner's appeal from the order of transfer.

This same contention relative to the codification of "forum non conveniens" including the unwarranted engrafting on the doctrine of the appealability of orders of *dis-*

missal thereunder was urged by petitioner upon the Court of Appeals. The Court stated:

> "Counsel for plaintiff rely upon decisions permitting appeals from dismissals in application of the principle of forum non conveniens; but these decisions are not in point. A dismissal in application of that or any other principle puts an end to the action and hence is final and appealable. An order transferring it to another district does not end but preserves it as against the running of the statute of limitations and for all other purposes. The notion that 28 USC 1404(a) was a mere codification of existing law relating to forum non conveniens is erroneous. It is perfectly clear that the purpose of this section of the Revised Judicial Code was to grant broadly the power of transfer for the convenience of parties and witnesses, in the interest of justice, whether dismissal under the doctrine of forum non conveniens would have been appropriate or not. See *Ex Parte Collett,* 337 U. S. 55; *Kilpatrick* v. *T. & P. R. Co.,* 337 U. S. 75; *United States* v. *National City Lines,* 337 U. S. 78; and *Amalgamated Association etc.* v. *Southern Bus Lines,* 5 Cir. 172 F. 2d 946, 948. As said by Judge Sibley in the case last cited:
>
> " 'Dismissal for inconvenience is not to be visited except when the choice of forum is a real hardship, or an imposition on the court. But here again we meet the Revision of Title 28, for Section 1404 providing for a change of venue is: "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." * * * Transfer is a less drastic matter than dismissal, for it involves no loss of time or pleading or costs, and no doubt a broader discretion may be exercised in ordering it.' " (R. 124, 177 F. [2] 360, 362)

To the same effect, see *Cinema Amusement Co.* v. *Loew's,* 85 F. Supp. 319 (D. Del.) and *Moore's Commentary on the U. S. Judicial Code,* Sec. 0.03 (29), pages 208-209 (1949 ed.).

The only case which petitioner presents as being in conflict with the decisions of the courts below is that of *Porta* v. *Watts,* 109 F. 2d 966, decided long before the enactment of 1404(a) of the Code. In that case the Court of Appeals for the Tenth Circuit entertained an appeal from the District Court's denial of an application to transfer a bankruptcy proceeding to another district in accordance with Section 118, Chapter 10 of the Chandler Act, 11 USCA 518. The fact that the Court of Appeals in that case entertained an appeal on a question of transfer is explained by the fact that under the bankruptcy laws and particularly Title 11 USCA, § 47, the jurisdiction of the Courts of Appeal for the United States is extended to "proceedings in bankruptcy, *interlocutory or final,* and in controversies arising in proceedings in bankruptcy, to review, affirm, revise or reverse both in matters of law and in matters of fact * * *". Since in bankruptcy matters the Court of Appeals have jurisdiction of appeals from orders, *final or interlocutory,* the decision in *Porta* v. *Watts, Supra,* is not pertinent here where there is no statute permitting appeals from interlocutory orders except injunctions.

There is also some suggestion by the petitioner that the opinion of the Court of Appeals is in conflict with the case of In re *Forstner Chain Corp.,* 177 F. 2d 572. There the appeal was from a ruling or order denying a motion to enter final judgment dismissing a complaint in a patent suit. At the outset of its opinion the Court stated:

> "Under the special circumstances, which we shall summarize below, we hold that the order is a 'final decision.' "

The Court also stated that the order denying the motion to enter final judgment, which occurred after the trial of the case, had the necessary element of finality in that after the entry of the order nothing remained to be done in the case by the trial court. In that connection the Court stated:

> "* * * If the present appeal is entertained by us, it will not be of the piece-meal variety, with the prospect of subsequent appeals from orders or judgments issued by the court below at later stages in the proceeding." (177 F. 2d 572, 575)

The facts of the *Forstner* case are markedly different from those of the instant case in any trial of which the District Court would be called upon to enter any and all appropriate preliminary orders and ultimately a final judgment.

The order of the Court of Appeals dismissing petitioner's appeal from the order of transfer and its opinion thereon are in harmony with the numerous decisions of this Court and other Courts of Appeal holding that a judgment or order to be appealable must be final in that it determines all of the issues of the controversy. The order in this case merely transferring the cause of action from one jurisdiction to another is obviously not a final and appealable order and is not in conflict with any cases cited by petitioner.

It is suggested by petitioner that this Court has not passed upon this question and that *certiorari* should be granted to enable this Court to review this important Federal question. Section 1404(a) of Title 28, USC, enacted June 25, 1948, became effective September 1, 1948 and since that time this section has been invoked by litigants and interpreted many times by trial courts in either granting or denying motions to transfer.

Petitioner refers to the citation of this section "some thirty times" in Shepard's United States Citations (Brief p. 40). Substantially each advance sheet of the Federal Reporter System includes additional cases involving this section. In spite of the fact that litigants throughout the United States have frequently petitioned for the transfer of cases and the adverse parties have opposed such transfers under this section, and in spite of the fact that trial courts have in many instances invoked the statute to order transfer, *this present case is the only one reported in which the appealability of such an order of transfer has been urged.* These facts suggest that, with the exception of petitioner in this case and its counsel, the opinion is uniform throughout the United States that an order of transfer under Section 1404(a) is not appealable. Under these circumstances there does not seem to be any likelihood that other Courts of Appeal will reach a conclusion different from that reached below and there is no disputed question of Federal law requiring the consideration of this Court.

POINT II

An Order of Transfer Under § 1404(a) of Title 28 USC Is Not Appealable Under § 1292(1) of Title 28, As An Interlocutory Injunction

Petitioner suggests that an order of transfer is in effect an injunction restraining plaintiff from pursuing its cause of action in the Eastern District of Virginia and, having the effect, is appealable under Title 28, USC § 1292(1).

This same argument was advanced by petitioner in the Court of Appeals. With respect to this contention the Court stated:

> "We think it equally clear that the order is not appealable under 28 USC 1292 (1) as one granting

> an interlocutory injunction. It should require no discussion to demonstrate that an order transferring or refusing to transfer a case for trial is not one granting or denying an interlocutory injunction and furnishes no ground for the application of the principle applied in the cases of *Enelow* v. *N. Y. Life Ins. Co.*, 293 U. S. 379, and *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188, a principle expressly limited to cases of that sort by the recent decision of the Supreme Court in *City of Morgantown* v. *Equitable Ins. Co.*, 337 U. S. 254. See also opinion of this Court in that case, 169 F. 2d 713." (R. 125, 177 F. 2d 360, 362)

Notwithstanding the foregoing, Petitioner persists in relying upon the cases of *Enelow* v. *N. Y. Life Ins. Co.*, 293 U. S. 379, and *Ettleson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188, as supporting the argument that an order of transfer is tantamount to an injunction. These cases are not applicable to the present situation. In each of them plaintiff had commenced an action to recover according to the terms of an insurance policy; in each of them the insurance company denied liability, alleging fraud in the procurement of the policy, and moved that the issue of fraud be tried by the court without a jury. The trial court in each case granted the motion and this Court held on review that the rulings thus made were appealable as constituting interlocutory injunctions.

In the present case the complaint charges the respondent with patent infringement. An answer to the complaint has not yet been filed and of course the court has made no segregation of equitable and legal causes of action for purposes of priority in trial. The order entered by the trial court does not enjoin anyone from doing anything but is merely a procedural adjudication based upon the court's factual determination that, for the convenience of the

parties and in the interest of justice, the venue of the action should be transferred.

The decision in *Morgantown* v. *Royal Ins. Co.*, 93 L. ed. Adv. Opinions 1023 (1949) is controlling in this case. There the plaintiff insurance company instituted suit for the reformation of a policy of insurance on the ground of mutual mistake and for a declaration of no liability under the policy. The defendant answered denying mistake and filed a counterclaim to recover on the policy as written. Plaintiff answered the counterclaim alleging the same facts as in its complaint. Defendant thereupon filed a demand for a jury trial under Rule 38(b) of the Federal Rules of Civil Procedure. Plaintiff moved to strike the demand for a jury trial and the Court granted the motion and set the case for trial without a jury. An appeal was taken from the order and on motion of the plaintiff the Court of Appeals dismissed the appeal on the ground that the order was not an appealable order (169 F. 2d 713). This Court granted *certiorari* and the question presented was whether or not the action of the trial court in striking the demand for a jury trial was under the circumstances of that case, appealable as an interlocutory decree granting or refusing an injunction. This Court discussed and distinguished the factual situations presented in the *Enelow* and *Ettelson* cases and said:

> "Whatever the present validity of the analogy to common law practice which supported those cases, it is of no help here. This is not a situation where a 'chancellor' in denying a demand for jury trial can be said to be enjoining a 'judge' who has cognizance of a pending action at law. This is rather a case of a judge making a ruling as to the manner in which he will try one issue in a civil action pending before himself. The fiction of a court with two sides, one of which

> can stay proceedings in the other, *is not applicable where there is no other proceeding in existence to be stayed.* The ruling from which the appeal in this case was prosecuted is an order interlocutory in form and substance. Nothing in the language of the rules or the Judicial Code brings it within the class of appealable decisions, and distinctions from common-law practice which supported our conclusions in the Enelow and Ettelson Cases supply no analogy competent to make an injunction of what in any ordinary understanding of the word is not one." (93 L. ed. Adv. Op. 1023, 1026)

The above language of this Court is peculiarly applicable to the situation presented in this case. The order of transfer does not in effect enjoin a "judge" who has cognizance of a pending action at law. The order of transfer is not an order of a "chancellor" restraining the prosecution of an action at law. *There is in the present case only one cause of action for patent infringement and the prosecution of this cause of action has in no way been enjoined.* Plaintiff-petitioner has the same right to pursue its cause of action after the order of transfer as it had before. The only limitation upon plaintiff-petitioner is that its cause of action must in the interest of justice, if it is desired to be pursued, be conducted in a forum more convenient to the parties than that initially selected by it.

If, as petitioner contends, the entry of an order for transfer pursuant to 28 USC, § 1404(a) constitutes an interlocutory injunction, then it is equally true that the denial of a petition for transfer under this section would constitute the refusal of an injunction and would likewise be appealable under 28 USC, § 1292(1). The adoption of the reasoning advanced by petitioner would result in appeals from all actions taken by trial courts under 28 USC, § 1404(a)

whether the transfer was ordered or not. Such a condition would result in the delay in the trial of many cases, the congestion of the dockets of Courts of Appeal and would contraverse the intention of Congress in the enactment of this section which provides legislative authority for the convenient, speedy and just determination of actions. The language of the Court of Appeals for the Fourth Circuit in *Morgantown* v. *Royal Ins. Co.*, 169 F. 2d 713, 715, is peculiarly apposite to petitioner effort to prefect an abortive appeal in this case:

> "Piecemeal appeals should not be encouraged; and certainly there is no reason why they should be allowed from interlocutory orders merely because a legal counterclaim has been asserted to a suit in equity. Nothing in law or in logic nor any consideration of public policy demand any such extension of the doctrine of the *Enelow* and *Ettelson* cases. *Trials ought not be delayed and appellate dockets crowded by appeals from interlocutory orders directing the course of litigation.* We have given short shrift to such dilatory appeals in other cases. See Bowles v. Commercial Casualty Ins. Co., 4 Cir., 107 F. 2d 169, and cases there cited. There is no reason to encourage them by any such forced interpretation of the statute relating to appeals from interlocutory injunctions as we would have to make to sustain the appeal here."

For the foregoing reasons, it is submitted that an order of transfer under Title 28 U. S. C. A., Section 1404(a) is not appealable under Title 28 U. S. C., Section 1292(1) as an interlocutory injunction.

POINT III

There Was No Abuse of Discretion by the Trial Court in Entering the Order of Transfer

As an alternative to its Petition for Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit petitioner has filed a Motion for Leave to File Petition for Writ of Mandamus or Certiorari. It is presumed that this latter motion is directed to the asserted abuse of discretion by the trial court in entering the order of transfer.

The propriety of the order depends upon the factual situation as presented to and thoroughly considered by the trial court. The affidavits of James S. Knowlson (R. 21) and John D. Black (R. 26) contain the factual showing upon which the motion for transfer was based. The affidavits filed on behalf of petitioner opposing the motion are those of August Johnson (R. 61) and Leonard L. Kalish (R. 41). It was upon a consideration of the facts set forth in these affidavits that the order was entered. No purpose would be served by discussing the many cases cited by petitioner wherein other courts *upon different factual situations* exercised their discretion to deny a similar motion.

Petitioner argued in the Court of Appeals that the trial court abused its discretion in entering the order and relative to this matter the Court stated:

> "Finally, we think that, even if the order were appealable, the appeal should be dismissed as presenting no question of substance for our consideration (*City of Morgantown* v. *Royal Ins. Co., supra,* 169 F. 2d at 714). Whether the judge below should have removed the case was a matter resting in his sound discretion (See *Stroud* v. *United States,* 251 U. S. 15, 20; *Kennon* v. *Gilmer, supra*); and there is nothing

in the record to indicate that the discretion was abused. In this posture of the case, there is no reason why we should entertain an appeal lacking in all substance." (R. 125, 177 F(2) 360, 362)

In asserting abuse of discretion by the trial court in the determination of a factual matter petitioner asks this Court to *review* the factual situation and make independent findings of fact. It is settled that this Court will not grant *certiorari* to review evidence for the purpose of factual determinations. This Court said in *United States* vs. *Johnston,* 268 U. S. 220, 227, 69 L. ed. 925, 926:

> "We do not grant a certiorari to review evidence and discuss specific facts."

Relative to writs of mandamus to review the action of a trial court on interlocutory matters this Court has stated:

> "Mandamus is an extraordinary remedy, to be resorted to for the purpose of securing judicial action, not for determining in advance what the action shall be. * * * It may not be resorted to, as the petitioners seek to resort to it here, for the purpose of controlling minor orders made in the conduct of judicial proceedings * * *." (In re Wagner, 249 U. S. 465, 471, 63 L. ed. 709, 713)

In *American Construction Co.* vs. *Jacksonville, T. & K. W. R. Co.,* 148 U. S. 372, 379, 37 L. ed. 486, 489, this Court stated relative to mandamus:

> "Least of all can a writ of mandamus be granted to review a ruling or interlocutory order made in the progress of a cause; for, as observed by Chief Justice Marshall, to do this 'would be a plain evasion of the provision of the act of Congress that final judgments only should be brought before this court for re-exam-

> ination;' would 'introduce the supervising power of this court into a cause while depending in an inferior court, and prematurely to decide it;' would allow an appeal or writ of error upon the same question to be 'repeated, to the great oppression of the parties;' and 'would subvert our whole system of jurisprudence.'"

In addition to the argument that the trial court abused its discretion in determining upon the facts presented that the order of transfer should be granted, petitioner suggests that the trial court abused its discretion in failing to distinguish between "the convenience of parties and witnesses" and "in the interest of justice". In its argument on this point petitioner tacitly concedes that while the order of transfer may have been for the convenience of the parties it is contended however that it is not "in the interest of justice".

In support of this aspect of the argument petitioner asserts that the case law or decisional law enunciated by the courts of the Seventh Circuit is not as favorable to petitioner as the case law or decisional law of the courts of the Fourth Circuit. There is no foundation for this assertion. Petitioner contends that it should be entitled to rely on the decisions of the Fourth Circuit in *Hoeltke* v. *C. M. Kemp Mfg. Co.*, 80 F. (2) 912 and *Chesapeake & Ohio Ry. Co.* v. *Kaltenbach*, 124 F. (2) 375 in respect to which it is said that: "Transfer of this action to a District Court in another circuit, would deprive petitioner of the right to rely on these two last-mentioned decisions * * *" (Brief Page 37). Petitioner quotes extensively from the *Hoeltke* case but significantly omits the following statement dealing with the same question of law:

> "The question was before the Circuit Court of Appeals of the Seventh Circuit in the recent case of Booth vs. Stutz Motor Car Co. of America (C.C.A.

> 7) 56 F (2) 962, and we think that the decision there rendered is eminently sound and just." (80 F (2) 912, 923)

Although petitioner may by the injudicious omission of pertinent portions of an opinion attempt to show a conflict of opinion between the Fourth and Seventh Circuits, there is actually no such conflict.

Petitioner's argument, that the transfer from one Circuit to another was not in the interest of justice, implies quite plainly that petitioner does not believe that justice will be administered to it by the courts of the Seventh Circuit. This argument is based wholly upon the speculation that the present case, not yet at issue, will be finally determined adversely to it in the Seventh Circuit and favorably to it in the Fourth Circuit. No useful purpose will be served by a discussion of the factual situations in the cases decided by the District Courts and the Court of Appeals for the Seventh Circuit which petitioner alleges constitute the decisional law unfavorable to it. Petitioner's argument that because of these earlier decisions, in which it was in no way involved, it cannot get "justice" in the courts of the Seventh Circuit requires no discussion. Indeed, it would be presumptuous for respondent to urge to this Court that petitioner *will* be given a fair trial and *will* secure impartial justice *in the court to which this case has been ordered transferred.*

If, as petitioner asserts, it is not "in the interest of justice" to it to have this case transferred to the courts of the Seventh Circuit and, if, as petitioner apparently pretends to believe, it will not secure justice in the courts of the Seventh Circuit, this Court upon final judgment has the power and authority to review the action of the courts of the Seventh Circuit and will insure that justice is administered impartially.

Petitioner's argument relative to the "interest of justice"

is not based upon any difference in the respective jurisdictions as to the substantive law, such for instance as a difference between applicable statutes of limitations or statutes of frauds. Such an argument cannot be made in this case because the complaint is one for patent infringement and is based upon the Federal patent statutes. Federal law and Federal law alone applies.

We do not and cannot of course concede that the petitioner will be denied justice because of the case law established by the decisions in the Seventh Circuit, but even if some of these decisions may be interpreted by petitioner as being not to its liking, it is of no legal consequence upon a motion to transfer. Petitioner's argument is in effect an assertion of prejudice or disqualification *on the part of all of the judges of the Seventh Circuit.* Such an assertion of prejudice cannot validly be based upon the fact that a judge, or the Judges thereof, have previously made adverse rulings. In *Ex parte American Steel Barrel Co.,* 230 U. S. 35, this Court stated:

> "The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, *but facts and reasons which tend to show personal bias or prejudice.* It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. * * * " (pp. 43-44)

Petitioner certainly cannot come within one of these rare exceptions since it was in no way involved in any of the

decisions complained of and the record does not show that it has otherwise established that it was ever involved in any litigation in any of the courts of the Seventh Circuit. Its argument is tantamount to saying that because of its preference for the decisional or case law of the Fourth Circuit it has a vested right to try the instant case in a District Court of that Circuit. As indicated above, this is an unwarranted attack upon the integrity of the Judges of the Seventh Circuit and completely disregards the apparent intent of Congress in enacting 28 U.S.C., Sec. 1404(a) which provides for transfer of causes of action from one jurisdiction to another.

It appears, therefore, that there was no abuse of discretion in the factual determination made by the trial court and upon which the order of transfer was based.

CONCLUSION

In conclusion it is respectfully submitted:

(1) that the order of the District Court of July 29, 1949, transferring the case pursuant to the provisions of Title 28 U. S. C., Section 1404(a), was not a *final* order and therefore not appealable under Title 28 U. S. C., Section 1291, and there is no error in the decision of the Circuit Court of Appeals in so holding (R. 123);

(2) that the order of the District Court of July 29, 1949, transferring the case pursuant to the provisions of Title 28 U. S. C., Section 1404(a), may not be interpreted as granting an injunction so as to become an *interlocutory* order appealable under Title 28 U. S. C., Section 1292(1), and there is no error in the decision of the Circuit Court of Appeals in so holding (R. 125);

(3) that the order of the District Court of July 29, 1949, transferring the case pursuant to the provisions of Title 28 U. S. C., Section 1404(a), involved an exercise

of discretion, review of which may not be had on appeal in the absence of abuse, of which there was no showing, and there is no error in the decision of the Circuit Court of Appeals in so holding (R. 125); and

(4) that there has been no showing that the decision of the Court of Appeals is in conflict with decisions of other Courts of Appeal of the United States on the question involved, or that such decision is probably in conflict with the applicable decisions of this Honorable Court.

The petition for a writ of *certiorari* and, in the alternative, a motion for leave to file a petition for a writ of *mandamus* or *certiorari,* should therefore be denied.

Respectfully submitted,

Richmond, Va.
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